



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE - TIPS FOR SMEs





Introduction

Neither employers nor employees want to see sexual harassment happen in the workplace.

This booklet of the Equal Opportunities Commission (EOC) is offered to help SMEs to develop and improve their sexual harassment workplace policies and measures.

On average, the EOC received more than 300 complaints lodged under the Sex Discrimination Ordinance (SDO) each year, and about 30% were related to sexual harassment in the workplace. Employers therefore must take workplace sexual harassment seriously and prevent it from taking place.

Under the SDO, employers may be held vicariously liable even if they have no knowledge about their employees' acts of sexual harassment. According to the amendments to the SDO in December 2014, providers of goods, facilities and services are also protected from sexual harassment by customers.

The EOC believes that it would be too late to redress the wrongdoings after sexual harassment had occurred; instead, proactive adoption of preventive measures is the desirable approach. Apart from this booklet, employers can also refer to the Framework for Corporate Policy on Sexual Harassment developed by the EOC: <http://www.eoc.org.hk/eoc/upload/2013116173930605619.pdf>

This booklet is provided for reference purposes only and should not be construed as legal advice. For specific enquiries, please seek independent legal advice or contact the EOC for assistance.

Why is an employer liable when his/her employee sexually harassed a colleague?

Employer neglecting employee's sexual harassment complaint may be held liable

B v King of the King Group Limited (DCE08/2010)

Former restaurant cashier, Ms. B, was sexually harassed by a dim sum cook. On one occasion the dim sum cook "L" touched Ms.B's chest and made fun of her figure. She had lodged complaints with her supervisor several times but her complaints were ignored. Instead, she was dismissed by her employer as a result of her slapping the dim sum cook. Consequently, Ms. B brought legal proceedings at the District Court through the Equal Opportunities Commission (EOC) against her employer King of the King Group Limited (King of King) for contravening the Sex Discrimination Ordinance (SDO).

The court ruled that L's acts amounted to sexual harassment, and that King of King had not taken reasonably practicable steps to prevent sexual harassment in the workplace, and ordered King of King to pay the plaintiff damages for injury to feelings in the sum of HK\$80,000, as well as costs. This case became the first case in Hong Kong in which the employer was convicted for vicariously liable for the acts of its employee.

Latest Amendments: Sex Discrimination Ordinance (SDO)

The SDO came into effect in 1996 and it covers sexual harassment acts occurred in specific fields, including:

- Employment;
- Education;
- Provision of goods, facilities or services;
- Sexual harassment by a manager of premises against an occupier of the premises.

The amended SDO was gazetted and came into effect on 12 December 2014. The scope of the SDO was extended to protect goods, facilities or service providers from sexual harassment by customers. Therefore, the SDO not only protects customers from sexual harassment; it also renders unlawful sexual harassment by customers against service providers in the process of seeking or receiving goods, services or facilities from them.

What is Sexual Harassment?

Examples

- Unwelcome physical contact
- Staring or leering at a person or at parts of his/her body
- Telling sexual jokes or speaking about one's own sex life in the workplace
- Displaying offensive or pornographic pictures, e.g. displaying nude photos on the computer screen
- Offensive communications of a sexual nature (letters, e-mail messages, etc.)

Targetting at a specific person

Any person making unwelcome sexual advances, or unwelcome request for sexual favors, to another person; or engaging in other unwelcome conduct of a sexual nature in relation to that other person, in circumstances in which a reasonable third party, having regard to all the circumstances, would have anticipated that person would be offended, humiliated or intimidated.

May not involve any specific target

Any person engaging in unwelcome conduct of a sexual nature which does not aim at anybody in particular, but will create a hostile or intimidating work environment.

We run only a small business. Are we governed by the Sex Discrimination Ordinance as well?

- All companies, regardless of size, are governed by the Sex Discrimination Ordinance.
- All employers must take "reasonably practicable steps" to prevent workplace sexual harassment. When incident of sexual harassment takes place, the employers should handle the matter appropriately and take remedial measures.
- There are two types of reasonably practicable measures:
(1) preventive measures; and (2) remedial measures.
- Employers must remember that if they bring up a defence, the burden of proof will be on them. Ultimately, the court will consider the circumstances of the case and decide whether the measures taken by the employer are sufficient.
- The following preventive and remedial measures are for reference only. Every case has to be considered in the context of their actual circumstances, in order to decide whether the measures taken by the employer are sufficient and reasonably practicable.

Reasonably practicable measures that employers should take

Preventive Measures

Anti-sexual harassment policy and position

- Develop a clear anti-sexual harassment policy for the company, to let employees know that the employer's no-tolerance position on any acts of sexual harassment in the workplace, and inform them of the complaint handling procedures, etc.

Establishing complaint channels

- Let employees know how to lodge a complaint and who to complain to in case they are sexually harassed.

Communication and training

- Provide regular reminders/training to employees to let them know what constitutes sexual harassment.

Remedial Measures

Handle complaints properly

- On receiving a complaint or becoming aware of a sexual harassment incident, the employer should follow up and handle it properly, e.g. by conducting an investigation.
- With the consent of the complainant, make temporary changes to work arrangements to prevent further incidents of sexual harassment from taking place.

Disciplinary measure

- If the allegation is proven to be true, the harasser should be appropriately warned and/or punished.
- Improve work arrangements as necessary to prevent sexual harassment from occurring again.

Review regularly

- Review company's policy on sexual harassment, complaint handling procedure and the related preventive measures. Also consider whether the remedial measures are effective in preventing sexual harassment.



Will an employer be held liable for sexual harassment that occurs among employees?

- Every employee, regardless of his/her post, will be held personally liable for his/her acts of sexual harassment in the course of employment.
- Employers may be held vicariously liable whether or not they know about or agree with their employees' acts of sexual harassment in the course of their employment.
- This is similar to a situation where an employee is authorized to perform duties for the company. If the employee infringes other people's rights or causes losses to a customer because of a mistake he/she made in the course of his/her employment, the employer will be held responsible for the mistake made by the employee.
- If the employer can prove that they have taken "reasonably practicable steps" to prevent sexual harassment in the workplace, the court may exempt them from their liability.

I am the manager of a small boutique. Under the new amendment to the Sex Discrimination Ordinance, if a customer sexually harasses a frontline salesperson, what should the manager do?


The company should inform their employees of the amendments and let them know what protection and rights they have under the SDO.

If frontline staff was sexually harassed by a customer, he/she should indicate the act was unwelcome and offensive. Details of the incident should be recorded (e.g. date, time, place, witness and what the harasser has said and done) and reported to the company's management.

When a manager is told about the sexual harassment incident, he/she should stop the customer right away and tell the customer that sexual harassment is unlawful, in order to prevent further incidents of sexual harassment. If the case is serious, such as involving an indecent act or indecent assault, consideration should be given as to whether to seek assistance from police.

If the company receives complaint of sexual harassment from its employee against a customer and continues to condone the acts of sexual harassment by customer against its employee, it may be held liable for contravening the SDO.

5 Steps to implement Anti-Sexual Harassment Policy

1. Formulate a corporate policy on anti-sexual harassment.
 2. Announce the anti-sexual harassment policy to all employees. The policy should be distributed and explained to all new employees. Verbal explanation of the policy may also be considered.
 3. Remind staff of the policy on a regular basis, e.g. in staff meetings or by posting notices to remind staff not to commit acts of sexual harassment. If resources allow, trainings should be provided to staff.
 4. Handle the matter promptly after receiving sexual harassment complaints or being informed of sexual harassment incidents.
 5. Review the anti-sexual harassment policy on a regular basis.
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Developing a Anti-Sexual Harassment Policy

SMEs should develop a simple and clear policy on anti-sexual harassment, which should include:

- A statement that sexual harassment in the workplace will not be tolerated;
- The definition of sexual harassment;
- Inform employees that they can lodge a complaint directly with the employer or the designated person who deals with sexual harassment complaints;
- Disciplinary actions;
- Other channels of complaint.

For details, please refer to the "Framework for Corporate Policy on Sexual Harassment" developed by the EOC:
<http://www.eoc.org.hk/eoc/upload/2013116173930605619.pdf>

Principles of Handling Sexual Harassment Complaints

Fairness

Complaints should be handled in an impartial manner and should ensure that both parties have chances to present their case.

Confidentiality

All information and records related to the complaint will be kept confidential and will only be disclosed to the relevant staff on a need-to-know basis.

Avoiding delay

Employer or the person-in-charge of handling complaints should deal with the complaints promptly.

Avoiding conflict of interest

If the employee who handles the complaint is closely related to the complainant or the alleged harasser, the case should be handled by employer or members of senior management.

Protection for complainants and witnesses

Complainants and witnesses should not be treated less favourably because of the complaint, e.g. being retaliated (victimization is in itself an unlawful act of discrimination under section 9 of the SDO).

Handling cases discreetly

Show empathy to the feelings of complainants, for instance, to avoid asking complainant to repeat his/her painful story again and again, in order to ensure that the complainant would not be unnecessarily further distressed or humiliated during the complaint process.



Real life situations of SMEs (1)

Receiving an internal complaint from an employee

Question:

I am the owner of an SME with only a few employees. My company does not have enough resources to handle complaints. I am very worried.

A complaint from an employee gives the company an opportunity to resolve the problem internally. SMEs should use available resources to handle it properly.

Understanding sexual harassment, employers' vicarious liability and defences

- Refer to the code of practice and other booklets developed by the EOC;
- Call the EOC hotline and enquire with the officer on the provisions of the relevant ordinance(s);
- Seek legal advice through other channels.

Handle the employee's complaint promptly

- Find out in detail how the incident happened and handle the matter in a just and reasonable manner;
- If the allegation is proven to be true, measures should be taken to prevent further occurrences of sexual harassment;
- Take corrective measures in respect of the incident; further measures, such as suspending the perpetrator from duty should be considered in case the perpetrator is a repeat offender.

Review effectiveness of existing measures

Assess measures developed previously; review whether the anti-sexual harassment policy, staff training and corrective measures, etc. are effective.



Real life situations of SMEs (2)

Receiving a complaint from an employee via the EOC

Question:

What should we do if the company receives a letter from the EOC informing us that an employee is going to lodge a complaint against the company?

The EOC is an impartial third party. It conciliates disputes in a professional manner. If a settlement is reached, the risk of legal proceedings can be avoided.

Role of the EOC

- The EOC is not a court. It will not give rulings on disputes;
- The EOC is impartial. It carries out conciliation and investigation as an independent body and will not take side with a complainant or a respondent.

Taking part in early conciliation

- The fact that the EOC arranges for a conciliation meeting does not mean that the employer has contravened the law;
- Taking part in early conciliation is voluntary. Both parties can reach a settlement under the EOC's conciliation. When early conciliation fails, the EOC will conduct an investigation.

Assisting in the investigation

- The purpose of the investigation is to ascertain facts and help both parties to understand the dispute and enable the EOC to decide whether to arrange for further conciliation, based on the ascertained facts;
- The information gathered during the investigation may be used in future legal assistance applications.



Dispelling misconceptions about sexual harassment

Misconceptions

Misconception1: A newly recruited male office assistant felt that he had been sexually harassed by a female colleague. How can a woman sexually harass a male colleague?

Misconception2: When we told sexual jokes in the pantry, a female colleague was there but she did not stop us. She ought to know that that was our joke culture. How could this be us sexually harassing her?

Misconception3: I only brushed against the female colleague's arm once and told her that she was very attractive. This one-off incident will not constitute sexual harassment, will it?

Misconception4: I only put a photo of a nude woman on my computer monitor at office. It is refreshing to look at it when I am tired at work. I did not mean for it to be seen by my female colleagues.

Clarifications

Answer1: The definition of sexual harassment under the law does not distinguish between men and women. A woman can sexually harass a man. A man can sexually harass another man.

Answer2: It is sexual harassment if the conduct in question creates a hostile or intimidating work environment for the other party.

Answer3: Sexually suggestive physical contact, even though not on the private parts, can constitute sexual harassment as long as it is inappropriate physical contact. Even an one-off incident can constitute sexual harassment.

Answer4: If one can expect that other colleagues passing by your work station will be able to see the nude photo on your computer desktop, then it may constitute sexual harassment.



FAQs

Q: Are employee courtships sexual harassment or personal disputes?

A male employee alleged that the female colleague kept writing him love letters and sending him sexually suggestive short messages. The male employee had refused her many times. He has complained to his employer that he was sexually harassed by the female colleague. Does the employer need to take any action?

A: Any unwelcome conduct of a sexual nature engaged in by an employee during his/her employment against another employee may constitute workplace sexual harassment. The male employee had rejected his female colleague's advances many times. This shows that the female colleague's behavior has caused him to feel offended and he has lodged a complaint with his employer. Therefore, the employer must enquire about the matter and deal with it appropriately in order to prevent further acts of sexual harassment from taking place.

Q : What does not constitute sexual harassment?

A : Acts of a sexual nature, flirtation, attraction and friendships that are welcome, two-way, consensual and interactive do not constitute sexual harassment.

Q: Is there a problem with the employer's attempt to handle the matter by playing it down ?

Miss Chan works as an administrative assistant in a construction company. Most of her colleagues are men. Male employees often talk about women's figures and their own sex life in the office. Miss Chan felt embarrassed and told the employer about this. The employer explained to Miss Chan that this had always been the male employees' work culture and told Miss Chan to avoid them and take the matter less seriously.

A : When employees publicly discuss in the office their own sex life and matters related to sex, it may cause nuisance and uneasiness to other employees who are present. Although the employees' discussions were not aimed at any particular person, the conduct has created a sexually hostile or intimidating work environment for other employees in the workplace.

Employer has the responsibility to remind all employees about the issue, e.g. by developing an anti-sexual harassment policy, issuing notices or providing relevant training, in order to enhance employees' understanding of the matter, and help them to foster a workplace culture of mutual respect.

FAQs

Q : Can a dismissal which has been compensated according to the Employment Ordinance constitute victimization against the complainant?

Mr. Wong is the General Manager of an SME. A newly recruited female employee Miss Chan told the supervisor of the Personnel Department that Mr. Wong often touched her behind knowingly or unknowingly in the hallway of the office. This made her feel uneasy and offended. As Mr. Wong is a relative of the employer, the supervisor of the Personnel Department did not dare offending him. Instead, he dismissed Miss Chan and compensated her according to the Employment Ordinance.

A : Under the Sex Discrimination Ordinance, if a company dismisses an employee because he/she has lodged a sexual harassment complaint, then the company may be held liable for discrimination by way of victimization, even though the company has given the female employee compensation according to the Employment Ordinance.

The company may also be held vicariously liable for its employee's act of sexual harassment, whether it was aware of the matter or not. Besides, Mr. Wong touched Miss Chan's behind inappropriately. This might also constitute a criminal offence of indecent assault.

What to do if one is sexually harassed?

Lodging a complaint through the following channels

Lodge a complaint with the employer

→ complaint to be handled by the employer

Lodge a complaint with the EOC

→ The EOC conducts conciliation and investigation. If post-investigation conciliation is unsuccessful, the Aggrieved Person may apply for legal assistance from the EOC.

For filing a complaint: 12 months within the time the act was done

File a claim with the District Court

→ A ruling to be given by the District Court

For filing a claim: 24 months within the time the act was done

What will the EOC do to help?

Investigation and Conciliation

The person concerned can lodge a complaint in writing with the EOC within 12 months from the time of the incident. On receiving the complaint, the EOC will investigate into the matter and attempt conciliation in due course. If the case cannot be resolved through conciliation, the complainant can apply for legal assistance from the EOC. The complainant can also consider applying for legal aid from the Legal Aid Department or initiate legal proceedings before the District Court of his/her own accord.

Policy Support

To help businesses to develop and improve their sexual harassment policies, the EOC has compiled all the important elements of such policies into a "Framework for Sexual Harassment Policies" and uploaded it to the EOC website for employers' reference.

SME support

Anti-Sexual Harassment Resources: to enhance the public's awareness of sexual harassment and help SMEs to develop preventive measures, the EOC webpage provides information on the prevention of sexual harassment:
<http://www.eoc.org.hk/>

How to contact the EOC?

Address: 16/F., 41 Heung Yip Road, Wong Chuk Hang, Hong Kong

Tel: 2511-8211

Fax: 2511-8142

Email: eoc@eoc.org.hk

Enquiries via SMS service (For people with hearing impairment / speech difficulties): 6972566616538

Website: www.eoc.org.hk

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